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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 575

UNITED BISCUIT COMPANY OF AMERICA, UNION BISCUIT DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 7-13) [1] is reported at 208 F. 2d 52. The findings of fact, conclusions of law, and order of the National Labor

[1] The symbol "R." refers to proceedings before the court below. The symbols "R. I.," "R. II." and "R. III." refer, respectively, to the Record as printed for the court below, the Appendix to the brief of the respondent below (petitioner here), and the Appendix to the Board's brief below. Occasional references to the typewritten transcript of testimony are designated by the symbol "Tr."

Relations Board (R. I. 17-42) are reported at 101 NLRB 1552.

JURISDICTION

The judgment of the court below was entered on December 10, 1953 (R. 13). The petition for a writ of certiorari was filed on February 4, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding, approved by the court below, that petitioner in violation of Section 8(a) (1) of the Act interfered with, restrained and coerced its employees in the exercise of their rights under the Act by systematically interrogating them concerning their views on union organization and soliciting their written disavowals of support for the union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 12-14.

STATEMENT

A. The Board's findings of fact

Following the usual proceedings under the Act, the court below approved the Board's findings that petitioner had violated Section 8(a)(1) of the Act by interrogating its employees about their attitude

toward the Union,[2] soliciting written disavowals from them of union sentiment, and soliciting and assisting employees to cancel the Union's authority to bargain for them. The subsidiary findings of fact may be summarized as follows:

1. *The individual interviews of employees following petitioner's disapproval of the Union*

Petitioner, a Delaware corporation, maintains office, plant and distribution facilities in St. Louis, Missouri. By July 15, 1951, petitioner had learned of the Union's effort to organize about 20 of its metropolitan area route salesmen who comprised petitioner's Divisions A and G (R. I. 24; R. II. 16). Soon after learning of the Union's activities, petitioner's local manager, Union Biscuit Division President Charles E. Kennedy, attended a joint "sales" meeting of the route salesmen in the two divisions (R. I. 24; R. II. 15, 16). The chief topic of this meeting was union activities, the ordinary business being "cut a little short" (R. I. 24, 25; R. II. 44).

Kennedy opened the meeting by asking the assembled salesmen to join him in a "straightforward discussion" of the Union and its organizing activities (R. I. 24; R. II. 16, 17). After telling them that they had a right to join, or to refrain from joining, the Union, he discussed petitioner's wage and commission scales, and other employee benefits, comparing them with similar compensation scales effective for route salesmen employed

[2] Local 611, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL.

by two of petitioner's competitors (R. I. 24; R. II. 17, 18, 19). Kennedy warned the employees not to rely too heavily on the Union's promises of better pay and working conditions, observing that petitioner would "have a voice in this thing, we are not just going to turn it over to 611 or to any other union * * *. The Company still reserves the right to manage the business." He added, "There might be some shutdowns * * *. I am not threatening in this * * * but there might be because we couldn't get together with the union on some understanding" (R. I. 24; R. II. 19, 20). He reminded the employees that petitioner had closed its Toledo plant: "We had high wages there, it was an unprofitable plant and the company finally decided to close it" (R. I. 24, 25; R. II. 20, 21, 22).

During the week after the sales meeting, Kennedy's secretary summoned about 15 of the 19 salesmen then employed in Divisions A and G to private interviews with Kennedy in his office (R. I. 25, 33; R. II. 26, 27). Most of the interviews followed a fixed pattern (R. I. 25, 26; R. II. 27). Kennedy testified that he told each salesman "[You] were at the meeting last week and * * * you heard * * * what I said and the general discussion * * *. You have probably talked this over and you have talked to the other men * * *. How do you feel about it?" (R. I. 26; R. II. 28.) According to Kennedy, "In every case, without exception, everyone of them said that they wanted no part of [the Union], they didn't feel it was necessary and they said when it come up to vote, that I knew

how they would vote * * * simply for no union" (R. I. 27; R. II. 28, 29, 40, 41).

The salesmen were not dismissed after giving Kennedy oral assurance of their anti-union sentiments. In each case, Kennedy testified, he "asked them if they would care to put that in writing on their own free will without any promises, or urging them or anything" (R. I. 27; R. II. 40). From eight to ten of the employees were willing to do so (R. I. 28; R. II. 37, 38, 40, 41).

According to Kennedy, not all of the salesmen who were willing to give him written statements were able to express themselves. Kennedy showed these inarticulate employees a sample statement he had prepared some time earlier (R. I. 27; R. II. 41; R. III. 7). He insisted that he did not allow any of the salesmen to copy his sample statement because, as he said, "I didn't want to be incriminated by letting them have it to digest * * *" (R. I. 27; R. II. 42).

Kennedy kept the statements and his own draft for several weeks, then destroyed the documents because he felt, "after studying it over," that he "shouldn't even have them" (R. I. 28; R. II. 38; R. III. 10-11).

2. *The withdrawals from the Union*

Kennedy's interrogation of employees Ferguson and Berry did not follow the exact pattern of the other interviews, for both of these employees admitted to Kennedy that they had given the Union

bargaining authority (R. I. 28, 29, 30; R. II. 31, 32, 47, 48, 57, 58, 62).

Immediately after the sales meeting, employee Ferguson requested an interview with Kennedy, but they did not meet until the following week (R. I. 25, n. 8, 33; R. II. 31, 61, 62). This interview, Kennedy testified, began with his asking Ferguson the questions asked of the other employees (R. I. 30; R. II. 32). During the interview, Ferguson told Kennedy that he had "signed something with the union," but that he would vote against the Union and wished to withdraw his authorization (R. I. 29, 30; R. II. 32, 62). Kennedy then showed Ferguson "a piece of paper"—apparently the sample statement used in the other interviews—and suggested that Ferguson prepare a letter revoking the bargaining authorization he had given to the Union (R. I. 29; R. II. 48; R. III. 15). Ferguson did so, with some additional aid from Kennedy (R. I. 29; R. II. 33, 63; R. III. 15) After Kennedy had approved the "phrasing" of the letter, Ferguson gave it to Kennedy's secretary to be mailed (R. I. 29, 30, 31; R. II. 32, 33, 63; R. III. 3, 15, Tr. 145, 146).

The interview with employee Berry was much the same. Berry was told to come to Kennedy's office (R. I. 25; R. II. 34; R. III. 14). When he reported, Kennedy asked him what he thought about the Union and whether he had talked with any union organizers. Berry replied that he had, and that he had signed an "application," adding upon further questioning, "I had a long time to consider things over * * * [and] felt different

* * *. I don't feel that I need anybody to argue my points for me * * *. (R. I. 30; R. II. 57, 58, 60; Tr. 138.) Kennedy asked Berry if he would care to write a statement to that effect. Berry agreed to do so, but because he did not know what to say in his statement Kennedy showed him a statement written by "one of the other boys" (R. I. 30; R. II. 59, 60). With that as a precedent, Berry prepared his withdrawal from the Union. He left it, with postage, to be mailed by Kennedy's secretary (R. I. 30, 31; R. II. 35, 58, 59, 60; R. III. 3, 4).

The statements of Ferguson and Berry were thereafter sent to the Union by Kennedy's secretary (R. I. 31; R. II, 38, 39).

B. The Board's conclusions and order

The Board concluded that, by interrogating its employees concerning their views as to union organization, by soliciting, requesting and assisting employees to prepare written statements of their attitude toward the Union, and by soliciting, requesting, and assisting employees to withdraw their union designations, petitioner interfered with, restrained and coerced the employees, in violation of Section 8(a) (1) of the Act, in the unconstrained exercise of the organizational rights guaranteed by Section 7 of the Act (R. I. 18, 39, 40, 41). Accordingly, the Board ordered petitioner to cease and desist from the unfair labor practices found and from abridging in any other manner the exercise by employees of the rights guaranteed them by Section 7 of the Act (R. I. 18-19). Affirma-

tively, the order requires petitioner to post appropriate notices (R. I. 19).

C. Judgment of the court below

The court below concluded that, taking into consideration "all the facts and surrounding circumstances," the Board's findings were adequately supported by the record as a whole, and enforced the Board's order in full (R. 7-16).

ARGUMENT

The decision below, approving the Board's finding that petitioner violated Section 8(a)(1) of the Act by systematically interrogating three quarters of the employees involved concerning their views as to union organization, presents no question warranting review by this Court. As petitioner does not dispute, employer interrogation of employees concerning their union activity and interest, when it passes the limits of non-coercive, casual, and isolated inquiry, constitutes a prohibited infringement of the employees' statutory right to engage in concerted activities free from employer interference or restraint. "When that limit is passed, judicial precedents are unanimous that a violation of Section 8(a) (1) may be found." *National Labor Relations Board* v. *Syracuse Color Press, Inc.*, 33 LRRM 2334, 2336 (C.A. 2, decided January 5, 1954).[3]

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[3] Illustrative recent cases in the Courts of Appeals are listed below by circuit:

First Circuit: *National Labor Relations Board* v. *Saxe-Glassman Shoe Corp.*, 201 F. 2d 238, 242.

Second Circuit: *National Labor Relations Board* v. *Chau-*

The court below, taking into consideration "all the facts and surrounding circumstances" of the instant case—including the systematic and wholesale character of the interrogation undertaken by a top-ranking management official, who had previously informed the employees of his opposition to the Union, and petitioner's solicitation of written disavowals by the employees of union sentiment—agreed with the Board, rightly we submit, that the interrogation in this setting carried a coercive thrust and constituted an "inhibitory weapon" proscribed by the Act. The conclusion of the court below thus raises only a question of substantial evidence, and this Court does not normally undertake to assess the sufficiency of the evidence supporting Board findings. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 491; *National Labor Relations Board* v. *Pitts-*

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tauqua Hardware Corp., 192 F. 2d 492, 494; *Precision Fabricators, Inc.* v. *National Labor Relations Board,* 204 F. 2d 567, 569.

Third Circuit: *National Labor Relations Board* v. *Kanmak Mills, Inc.*, 200 F. 2d 542, 543.

Fourth Circuit: *National Labor Relations Board* v. *Southland Mfg. Co.*, 201 F. 2d 244, 245.

Fifth Circuit: *National Labor Relations Board* v. *Stratford Furniture Corp.*, 202 F. 2d 884, 886-887.

Sixth Circuit: *National Labor Relations Board* v. *F. H. McGraw & Co.*, 206 F. 2d 635, 640.

Seventh Circuit: *National Labor Relations Board* v. *Jackson Press, Inc.*, 201 F. 2d 541, 545.

Eighth Circuit: *National Labor Relations Board* v. *Cold Spring Granite Co.*, 208 F. 2d 163, 165.

Ninth Circuit: *National Labor Relations Board* v. *W. T. Grant Co.*, 199 F. 2d 711, certiorari denied, 344 U. S. 928.

Tenth Circuit: *National Labor Relations Board* v. *Tri-State Casualty Ins. Co.*, 188 F. 2d 50, 53.

burgh Steamship Company, 340 U. S. 498, 502-503.

The different results in the decisions cited by petitioner do not stem from any differences in principle, but are attributable solely to the circumstance that "they differ factually from the instant case. They exemplify the casual, perfunctory, non-hostile interrogation by minor supervisory employees" which has been held permissible. *National Labor Relations Board* v. *Syracuse Color Press, Inc., supra*, 33 LRRM at 2336. Nothing in those cases suggests that a program, like the one here, of private interviews with employees and interrogation concerning their views on union organization, coupled with solicitation of written disavowals of union sentiment, is to be treated as innocuous and is therefore to be disregarded.[4]

---

[4] Petitioner's claim that the coercive character of the interrogation could not, consistent with Section 8(c) of the Act, be appraised in the context of the surrounding circumstances, such as petitioner's expressed opposition to the Union, finds no support in the cases, including those cited by petitioner (Pet. 15-18). In addition to those cases, see, *National Labor Relations Board* v. *Syracuse Color Press, Inc., supra; National Labor Relations Board* v. *Fulton Bag and Cotton Mills*, 175 F. 2d 675, 676-677 (C.A. 5). The decisions recognize "that words are not to be looked at in a vacuum, but in the light of all the circumstances surrounding their utterance," *National Labor Relations Board* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445, 448 (C.A. 9).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,
National Labor Relations Board.

MARCH, 1954.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression con-

tains no threat of reprisal or force of promise of benefit.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuits courts of appeal to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate

temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modfied, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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